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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1944

SIMON METRIK,

*Petitioner,*

—against—

FORT TRYON GARDENS, INC.,

*Respondent.*

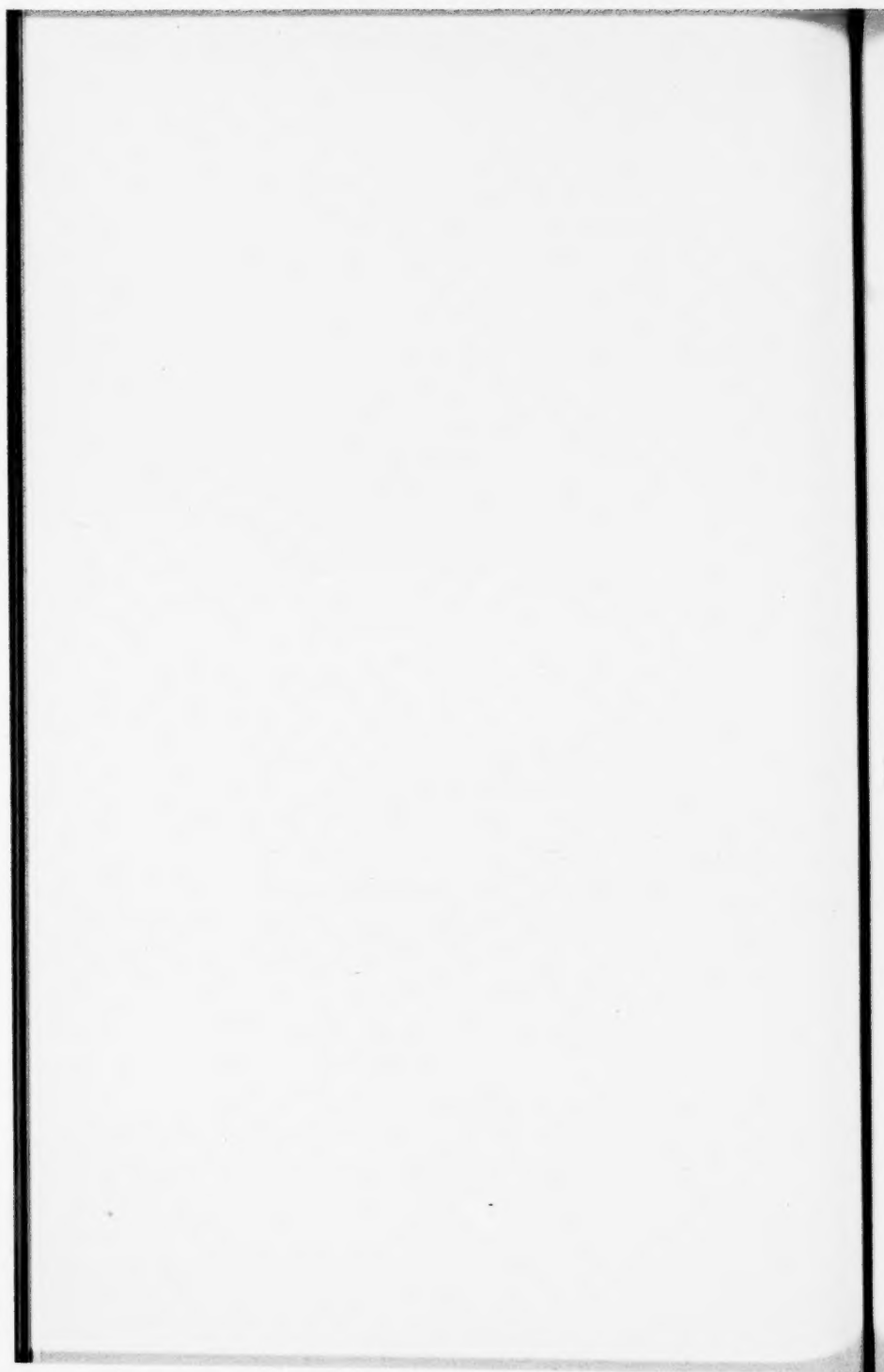
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
APPELLATE TERM, FIRST DEPARTMENT, OF  
THE SUPREME COURT OF THE STATE OF NEW  
YORK, AND BRIEF IN SUPPORT THEREOF**

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JACOB W. FRIEDMAN,  
*Attorney for Petitioner.*

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## INDEX

	PAGE
Petition for a Writ of Certiorari to the Appellate Term, First Department of the Supreme Court of the State of New York .....	1
Statement of Matters Involved .....	2
Question Presented .....	4
Reason for Allowance of Writ .....	5
Brief in Support of Petition .....	7
Opinions Below .....	7
Jurisdiction .....	7
Statutes Involved .....	8
Statement of the Case .....	8
Specification of Error to Be Urged .....	8
Argument:	
New York Civil Practice Act, Sections 1419 and 1421, to the extent that they permit the issuance of a final order and an eviction in summary pro- ceedings upon two hours' notice, should be held unconstitutional as sanctioning the deprivation of property upon insufficient notice and there- fore without due process of law .....	9
Conclusion .....	16

TABLE OF CASES CITED:

	PAGE
Clarke v. Carlisle Foundry Co., 150 Misc. 710, 270 N. Y. S. 351 .....	13, 14
Finn v. Chase National Bank, 176 Misc. 127, 27 N. Y. S. 771 .....	13
Hackner v. Guaranty Trust Co. (C. C. A. 2) 117 F. 2d 95 .....	14
Mud Bay Logging Co. v. Dept. of Labor & Indus- tries, 189 Wash. 285, 64 P. 2d 1054 .....	14
Rassner v. Federal Collateral Society, 299 Mich. 206, 300 N. W. 45 .....	14
Roller v. Holley, 176 U. S. 398, 44 L. Ed. 520 .....	11, 12
Tyson v. Tyson, 219 N. C. 617, 14 S. E. 2d 673 .....	14
Voeller v. Neilston Warehouse Co., 136 Ohio St. 427, 26 N. E. 2d 442 .....	14
Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 ....	14, 15

OTHER AUTHORITIES CITED:

New York Civil Practice Act:

Section 1419 .....	4, 8, 9
Section 1421 .....	4, 8, 9, 10

Constitution of the United States:

Amendment XIV, Section 1 .....	4, 9, 11
--------------------------------	----------

Section 237 of the Judicial Code as amended, 28

U. S. C., Section 344, Subdivision b .....	7
--	---

2 Chitty's General Practice 175 .....	12, 13
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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THE SUPREME COURT OF THE STATE OF  
NEW YORK**

*To the Honorable Chief Justice of the United States and the  
Associate Justices of the Supreme Court of the  
United States:*

Your petitioner Simon Metrik respectfully prays for a writ of certiorari to the Appellate Term, First Department, of the Supreme Court of the State of New York, the highest court of the State in which a decision could be had, to review a determination of that Court, rendered on June 14th, 1944, affirming an order of the Municipal Court of the City of New York, denying petitioner's motion to vacate a certain final order of the said Municipal Court, which final order awarded to respondent the possession of certain real property (R. 57-59). The time for filing the present petition for certiorari has been extended by Mr. Justice Jackson to and including March 1st, 1945 (R. 80).

### ***Statement of Matters Involved***

This is a summary proceeding to recover possession of an apartment dwelling in New York City, of which the petitioner herein was the tenant and the respondent herein the landlord. Respondent sought to oust petitioner as a hold-over on the theory that his lease had expired (R. 4-5), while petitioner contended that the lease had been renewed for an additional year (R. 9, 12).

The proceeding was commenced by the service of a copy of the petition and precept on petitioner's wife on September 15th, 1943, returnable the same day at 12:05 P. M. (R. 3). The exact hour and minute of service became material in view of the New York statute, which will hereinafter be discussed, requiring a minimum notice of two hours. Petitioner urged that the service was effected at 10:30 A. M., and certainly not before 10:15 A. M. (R. 10, 13), while respondent insisted that service was made at 10:02 A. M. (R. 18). In other words, respondent argued that it had given 2 hours 3 minutes notice of the proceeding, while petitioner contended that the notice given was substantially less than two hours. This issue was ultimately resolved in favor of respondent, however unjustly (R. 57), and for the purposes of the present petition it will be assumed that the notice actually given was 2 hours 3 minutes.

There is no controversy regarding the fact that the papers were served only on the wife of the petitioner and that she was at home at the time with two young children (R. 9). Petitioner, who is an attorney, was then en route to fulfil a court engagement in Jamaica, a considerable distance from his home in uptown Manhattan, and his wife found it impossible to communicate with him until the eviction was actually taking place (R. 9). At 12:05 P. M. the respondent proceeded to take an inquest, obtained a final order awarding to it the possession of the premises and immediately turned over the warrant of dispossess to a marshal for

hold furniture was in the course of being removed from the execution. That same afternoon, while petitioner's house-apartment and placed on the sidewalk, his wife finally succeeded in reaching him (R. 9). He hastily prepared and obtained an order to show cause the same day (R. 8), making his motion returnable the following day. His original and supplemental affidavits (R. 9-13) urged divers grounds for invalidating the proceedings theretofore had, including the following (R. 11):

"In any event, should Civil Practice Act, Sections 1419 and 1421, be construed as permitting my eviction, on two hours' so-called notice left at my home in my absence, I respectfully urge the unconstitutionality of those statutes as being contrary to the provisions of the Constitution of the United States, Amendment XIV, Sec. 1, forbidding the deprivation of property without due process of law. I submit that due process of law must include reasonable notice, which notice is not afforded herein."

He also showed facts indicating the existence of a meritorious defense to the proceeding (R. 12), as to which defense, incidentally, he has not yet succeeded in having his day in court. On the hearing of the motion, petitioner urged all grounds, including the constitutional one, and asked that the proceeding be dismissed as a nullity or that he be given an opportunity to defend on the merits. His motion was denied on September 30th, 1943. On appeal to the Appellate Term of the Supreme Court, First Department, the order appealed from was, on March 2d, 1944, reversed and the case remitted for the taking of oral testimony as to the time of service of the precept.

About one half of the transcript of record (R. 17-57) consists of the testimony on the hearing as to the time of service. None of this matter is pertinent to the issues on the

certiorari petition, but is included on the insistence of respondent, the latter having declined to stipulate as to any curtailment of the record. The Municipal Court, before which the constitutional question was again asserted (R. 54-55), overruled the traverse on March 9th, 1944, and denied petitioner's motion to vacate the final order in the summary proceeding (R. 57).

Petitioner again duly appealed to the Appellate Term of the Supreme Court, First Department, and the order appealed from was affirmed on June 14th, 1944 (R. 58). Petitioner duly applied to the said Appellate Term for permission to take a further appeal to the Appellate Division of the Supreme Court, First Department, and on June 19th, 1944, this application was denied (R. 64-65). A like motion, addressed to the Appellate Division of the Supreme Court, First Department, was duly made and by that Court likewise denied on October 13th, 1944 (R. 79-80). Accordingly, the said Appellate Term of the Supreme Court was the highest court of the State in which a decision could be had. As has been heretofore noted, the time for applying for certiorari has been duly extended to March 1st, 1945 (R. 80).

The constitutional question was presented on the first opportunity in the Municipal Court and was preserved and argued before every appellate tribunal on each appeal and motion.

### ***Question Presented***

Are Sections 1419 and 1421 of the New York Civil Practice Act, in so far as they permit the issuance of a final order and an eviction upon two hours' notice, unconstitutional in that they provide for insufficient notice and therefore violate due process of law, in contravention of the Constitution of the United States, Amendment XIV, Section 1?



***Reason for Allowance of Writ***

The holdings of the courts of New York that a person may lawfully, under the statutes involved, be deprived of the possession of real property through a proceeding concluded two hours after its inception, destroy the requirement of reasonable notice as an indispensable element of due process; these holdings are at variance with controlling authority and with the common, accepted understanding of the law; and the statutes appear to be plainly repugnant to the due process clause of the Constitution.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Term, First Department, of the Supreme Court of the State of New York, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings of said Appellate Term, First Department, of the Supreme Court of the State of New York, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the determination of the Appellate Term, First Department, of the Supreme Court of the State of New York, be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., February 26th, 1945.

SIMON METRIK,

By JACOB W. FRIEDMAN,  
*Attorney for Petitioner.*